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11 IN THE UNITED STATES DISTRICT COURT
12 FOR THE NORTHERN DISTRICT OF CALIFORNIA
13 SAN FRANCISCO DIVISION

15 | SIEU PHONG NGO.

Petitioner,

No. C 08-0620 JSW (PR)

18 BEN CURRY, Warden.

Respondent.

**RESPONDENT'S ANSWER
TO THE PETITION FOR
WRIT OF HABEAS CORPUS;
SUPPORTING
MEMORANDUM OF POINTS
AND AUTHORITIES**

21 As an Answer to the Petition for Writ of Habeas Corpus filed by prisoner Sieu Ngo,
22 Respondent Ben Curry, Warden at the Correctional Training Facility, admits, alleges, and denies
23 that:

24 1. Sieu Ngo (J-07024) is in the lawful custody of the California Department of
25 Corrections and Rehabilitation following his 1994 conviction of second degree murder with a
26 firearm enhancement, for which the trial court sentenced him to a total of sixteen years to life.
27 (Pet., Supporting Br. 2.) In this Petition, Ngo alleges that the Board of Parole Hearings's
28 February 8, 2006 decision finding him unsuitable for parole violated his federal due process

1 rights because by solely relying on the commitment offense, the Board's decision was not
 2 supported by any evidence that he is a current danger to public safety. (See generally Pet.) Ngo
 3 does not appear to challenge the Board's separate decision denying him parole for two years.
 4 (See generally Pet.)¹⁴

5 2. Ngo filed a petition for writ of habeas corpus in the Superior Court of Orange
 6 County, generally alleging the same claim that he does in this Petition. (Ex. 1.) The superior
 7 court denied the petition, and issued a reasoned decision. (Ex. 2.) Specifically, the superior
 8 court found that under *In re Dannenberg*, 34 Cal.4th 1061, 1071 (2005), the Board properly
 9 relied on the commitment offense when denying Ngo parole because the Board relied on the
 10 gang-related nature of the offense, which was a factor beyond the minimum elements of second
 11 degree murder. (Ex. 2 at 3.) Thus, under *Dannenberg*, the superior court concluded that the
 12 Board was "not required to consider the factors set forth in the California Code of Regulations,
 13 title 15, section 2402." (Ex. 2 at 3.) The superior court also found that the Board's concern with
 14 Ngo's lack of insight was proper under the provision of California Penal Code section 3041(b)
 15 that parole be denied if public safety requires a longer period of incarceration. (Ex. 2 at 3.)

16 3. Following the superior court's denial, Ngo then generally alleged the same claim
 17 in petitions for writ of habeas corpus filed in the California Court of Appeal (Ex. 3) and in the
 18 California Supreme Court (Ex. 5). The petitions were summarily denied. (Exs. 4, 6.)

19 4. Respondent admits that Ngo exhausted his state court remedies regarding his
 20 claim that the Board's February 8, 2006 decision finding him unsuitable for parole violated his
 21 federal due process rights because by solely relying on the commitment offense, the Board's

22 1. Ngo also challenges the superior court's decision upholding the Board's reliance on Ngo's
 23 lack of insight and regarding how the Board applied the regulations. (Pet., Supporting Br. 1.) This
 24 Court did not address this claim in the Order to Show Cause presumably because this claim lacks
 25 merit because it addresses how the state court addressed state law, which does not warrant federal
 26 habeas relief. 28 U.S.C. § 2254(a); *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) (noting that
 27 federal habeas relief is not available to "reexamine state-court determinations on state-law
 28 questions"); *Pulley v. Harris*, 465 U.S. 37, 41 (1984) ("A federal court may not issue the writ on the
 basis of a perceived error of state law."); *Langford v. Day*, 110 F.3d 1380, 1389 (9th Cir. 1996)
 (noting that a habeas petitioner may not transform a state law issue into a federal one merely by
 asserting a due process violation). Accordingly, Respondent will not address this claim unless this
 Court specifically orders.

1 decision was not supported by any evidence that he is a current danger to public safety.
 2 Respondent denies that Ngo has exhausted this claim to the extent it is interpreted more broadly
 3 to encompass any systematic issues beyond this claim.

4 5. Respondent admits that the Petition is timely under 28 U.S.C. § 2244(d)(1).

5 Respondent admits that the Petition is not subject to any other procedural bar.

6 6. Respondent denies that Ngo is entitled to federal habeas relief under 28 U.S.C. §
 7 2254 because the state court decisions were not contrary to, or an unreasonable application of,
 8 clearly established federal law as determined by the United States Supreme Court, or based on an
 9 unreasonable determination of the facts.

10 7. Respondent denies that Ngo has a federally protected liberty interest in parole and,
 11 therefore, alleges that he has not stated a federal question invoking this Court's jurisdiction. The
 12 Supreme Court of the United States has not clarified the methodology for determining whether a
 13 state has created a federally protected liberty interest in parole. *See Greenholtz v. Inmates of*
 14 *Neb. Penal & Corr. Complex*, 442 U.S. 1, 12 (1979) (liberty interest in conditional parole release
 15 date created by unique structure and language of state parole statute); *Sandin v. Connor*, 515 U.S.
 16 472, 484 (1995) (federal liberty interest in correctional setting created only when issue creates an
 17 "atypical or significant hardship" compared with ordinary prison life); *Wilkinson v. Austin*, 545
 18 U.S. 209, 229 (2005) (*Sandin* abrogated *Greenholtz*'s methodology for establishing the liberty
 19 interest). California's parole statute does not contain mandatory language giving rise to a
 20 protected liberty interest in parole under the mandatory-language approach announced in
 21 *Greenholtz*. And continued confinement under an indeterminate life sentence does not impose an
 22 "atypical or significant hardship" under *Sandin* because a parole denial does not alter a prisoner's
 23 sentence, impose a new condition of confinement, or otherwise restrict his liberty while he serves
 24 his sentence. Thus, Respondent asserts that Ngo does not have a federal liberty interest in parole
 25 under either *Greenholtz* or *Sandin*. Respondent acknowledges that in *Sass v. California Board of*
 26 *Prison Terms*, 461 F.3d 1123, 1128 (9th Cir. 2006) the Ninth Circuit held that California's parole
 27 statute creates a federal liberty interest in parole under the mandatory-language analysis of
 28 *Greenholtz*, but this issue is currently under review by an en banc panel of the Ninth Circuit.

1 *Hayward v. Marshall*, 527 F.3d 797 (9th Cir. 2008).

2 8. Even if Ngo has a federal liberty interest in parole, he received all due process to
 3 which he is entitled under clearly established federal law because he was provided with an
 4 opportunity to be heard and a statement of reasons for the Board's decision. *Greenholtz*, 442
 5 U.S. at 16; (e.g., Pet., Ex. 1 at 56-66).^{2/}

6 9. Respondent denies that the some-evidence test is clearly established federal law in
 7 the parole context.

8 10. Respondent denies that the Board's 2006 decision violated Ngo's due process
 9 rights, was arbitrary and capricious, was not supported by some evidence, relied on the
 10 commitment offense alone, and improperly characterized Ngo's offense as being beyond the
 11 minimum elements necessary to sustain a conviction for second degree murder.

12 11. Respondent denies that clearly established United States Supreme Court law
 13 prohibits the Board from continually relying on the nature of the crime or any unchanging factor
 14 when determining his parole suitability, establishes that an unchanging factor is not probative of
 15 the issue of current danger, requires that a parole denial be based on post-conviction factors in
 16 part or in whole, and requires the Board to consider every factor set forth in section 2402, of title
 17 15, of the California Code of Regulations.

18 12. Respondent denies that the Board failed to provide Ngo due consideration by
 19 failing to consider all available relevant, reliable evidence when determining Ngo's suitability for
 20 parole, including Ngo's age at the time of the offense (Pet., Ex. 1 at 8, 10, 48, 57), and Ngo's
 21 behavior in prison (Pet., Ex. 1 at 13-20, 22-24, 45, 61-62). Respondent also denies that Ngo was
 22 under significant stress at the time of the offense. (See, e.g., Pet., Ex. 1 at 9.)

23 13. The superior court did not consider the Board's reliance on the district attorney's
 24 opposition to Ngo's parole. (Compare Ex. 2, with Pet., Ex. 1 at 63.) But this Court can still
 25 consider this factor because under AEDPA, this Court's review only addresses whether the state
 26 court's decision, as opposed to its reasoning, is an unreasonable application of federal Supreme
 27 Court law. *Hernandez v. Small*, 282 F.3d 1132, 1140 (9th Cir. 2002) (determining in habeas

28 2. Respondent refers to the page numbers on top of the transcript and not to the handwritten
 page numbers on the lower right corner of Ngo's exhibits.

1 proceedings that "the intricacies of the state court's analysis need not concern us; what matters is
 2 whether the *decision* the court reached was contrary to controlling federal law").

3 14. Respondent denies that Ngo is challenging the Board's separate decision to deny
 4 him parole for two years. If this Court finds otherwise, Respondent denies that that decision
 5 violated Ngo's due process rights.

6 15. Respondent submits that an evidentiary hearing is not necessary because the
 7 claims can be resolved on the existing state court record. *Baja v. Ducharme*, 187 F.3d 1075,
 8 1078 (9th Cir. 1999).

9 16. Respondent denies that Ngo is entitled to release. The remedy is limited to the
 10 process that is due, which is a new hearing by the Board comporting with due process. *See*
 11 *Benny v. U.S. Parole Comm'n*, 295 F.3d 977, 984-85 (9th Cir. 2002) (a liberty interest in parole
 12 is limited by the Board's exercise of discretion, and a due process error does not entitle an inmate
 13 to a favorable parole decision).

14 17. Ngo fails to state or establish any grounds for habeas corpus relief.

15 18. Except as expressly admitted in this Answer, Respondent denies the allegations of
 16 the Petition.

17 **MEMORANDUM OF POINTS AND AUTHORITIES**

18 **INTRODUCTION**

19 Ngo contends that the Board's 2006 decision finding him unsuitable for parole violated
 20 his due process rights. But Ngo merely alleges a disagreement with the Board's decision, and
 21 fails to establish that the state court decisions denying his due process claims are contrary to, or
 22 an unreasonable application of, clearly established federal law as determined by the United States
 23 Supreme Court, or were based on an unreasonable determination of the facts. Thus, there are no
 24 grounds for federal habeas relief. Accordingly, this Court should deny the Petition.

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ARGUMENT

I.

NGO HAS NOT SHOWN THAT HE IS ENTITLED TO RELIEF UNDER AEDPA.

5 Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) a federal
6 court may not grant a writ of habeas corpus unless the state court's adjudication was either: 1)
7 "contrary to, or involved an unreasonable application of, clearly established Federal law, as
8 determined by the Supreme Court of the United States;" or 2) "based on an unreasonable
9 determination of the facts in light of the evidence presented at the State Court proceeding."
10 28 U.S.C. § 2254(d)(1-2) (2000). Ngo has not demonstrated that he is entitled to relief under this
11 standard.

A. Ngo Has Not Shown that the State Court Decisions Were Contrary to Clearly Established Federal Law.

14 As a threshold matter, the Court must decide what, if any, “clearly established Federal
15 law” applies. *Lockyer v. Andrade*, 538 U.S. 63, 71 (2003). In making this determination, the
16 Court may look only to the holdings of the United States Supreme Court governing at the time of
17 the state court’s adjudication. *Carey v. Musladin*, 549 U.S. 70, 127 S. Ct. 649, 653 (quoting
18 *Williams v. Taylor*, 529 U.S. 362 (2000)). The only case in which the Supreme Court has
19 addressed the process due in state parole proceedings is *Greenholtz*. *Greenholtz*, 442 U.S. 1.
20 The Supreme Court there held that due process is satisfied when the state provides an inmate an
21 opportunity to be heard and a statement of the reasons for the parole decision. *Id.* at 16. “The
22 Constitution does not require more.” *Id.*^{3/} No other Supreme Court holdings require more at a
23 parole hearing.

24 Ngo does not contest that he received the *Greenholtz* protections. (See generally Pet.)
25 Because *Greenholtz* was satisfied and *Greenholtz* is the only Supreme Court authority regarding

26 3. The Supreme Court has cited *Greenholtz* approvingly for the proposition that the “level
27 of process due for inmates being considered for release on parole includes an opportunity to be heard
28 and notice of any adverse decision” and noted that, although *Sandin* abrogated *Greenholtz*’s
methodology for establishing the liberty interest, *Greenholtz* remained “instructive for [its] discussion of the appropriate level of procedural safeguards.” *Austin*, 545 U.S. at 229.

1 an inmate's due process rights during parole proceedings, the state court decision upholding the
 2 Board's decision was not contrary to clearly established federal law. Thus, the Petition should be
 3 denied.

4 Although Ngo alleges that the Board's decision must be supported by some evidence,
 5 there is no clearly established federal law applying the minimal some-evidence standard to parole
 6 decisions. The Supreme Court has held that under AEDPA a test announced in one context is
 7 not clearly established federal law when applied to another context. *Wright v. Van Patten*,
 8 U.S. __ 128 S. Ct. 743, 746-47 (2008); *Schrivo v. Landrigan*, __ U.S. __, 127 S. Ct. 1933
 9 (2007); *Musladin*, 127 S. Ct. at 652-54; *see also Foote v. Del Papa*, 492 F.3d 1026, 1029 (9th
 10 Cir. 2007); *Crater v. Galaza*, 491 F.3d 1119, 1122 (9th Cir. 2007); *Nguyen v. Garcia*, 477 F.3d
 11 716, 718, 727 (9th Cir. 2007). The Supreme Court developed the some-evidence standard in the
 12 context of a prison disciplinary hearing, *Superintendent v. Hill*, 472 U.S. 445, 457 (1985), which
 13 is a fundamentally different context than a parole proceeding. Because the tests and standards
 14 developed by the Supreme Court in one context cannot be transferred to distinguishable factual
 15 circumstances for AEDPA purposes, it is not appropriate to apply the some-evidence standard of
 16 judicial review to parole decisions.

17 While the Ninth Circuit has applied the some-evidence standard to parole decisions, this
 18 is improper under AEDPA, and the issue is currently pending before an en banc panel of the
 19 Ninth Circuit. *Hayward*, 527 F.3d 797. AEDPA does not permit relief based on circuit case law.
 20 *Crater*, 491 F.3d at 1123, 1126 (§ 2254(d)(1) renders decisions by lower courts non-dispositive
 21 for habeas appeals); *Earp v. Ornoski*, 431 F.3d 1158, 1182 (9th Cir. 2005) ("Circuit court
 22 precedent is relevant only to the extent it clarifies what constitutes clearly established law.")
 23 (citing *Duhame v. Ducharme*, 200 F.3d 597, 600-01 (9th Cir. 2000) ("Ninth Circuit precedent
 24 derived from an extension of a Supreme Court decision is not 'clearly established federal law as
 25 determined by the Supreme Court.'")). Therefore, the Ninth Circuit's use of the some-evidence
 26 standard is not clearly established federal law and is not binding on this Court. *See, e.g., Irons v.*
 27 *Carey*, 505 F.3d 846, 851 (9th Cir. 2007); *Sass*, 461 F.3d at 1128; *Biggs v. Terhune*, 334 F.3d
 28 910 (9th Cir. 2003).

1 Similarly, Ngo's claim that the Board's reliance on the immutable factor of his
 2 commitment offense violates due process finds no support in Supreme Court precedent.
 3 Although the Ninth Circuit has suggested that this might amount to an additional due process
 4 claim, *Biggs*, 334 F.3d at 917, federal habeas relief is not available because there is no clearly
 5 established federal law precluding reliance on unchanging factors. 28 U.S.C. § 2254(d).

6 In sum, the only clearly established federal law setting forth the process due in the parole
 7 context is *Greenholtz*. Ngo does not allege that he failed to receive these protections. Therefore,
 8 Ngo has not shown that the state court decisions denying habeas relief were contrary to clearly
 9 established federal law.

10 **B. Ngo Has Not Shown that the State Courts Unreasonably
 11 Applied Clearly Established Federal Law.**

12 Habeas relief may only be granted based on AEDPA's unreasonable-application clause
 13 where the state court identifies the correct governing legal rule from Supreme Court cases but
 14 unreasonably applies it to the facts of the particular state case. *Williams*, 529 U.S. at 406. The
 15 petitioner must do more than merely establish that the state court was wrong or erroneous. *Id.* at
 16 410; *Lockyer*, 538 U.S. at 75. Respondent recognizes that the Ninth Circuit applies the some-
 17 evidence standard as clearly established federal law, but even accepting that premise, Ngo is not
 18 entitled to federal habeas relief. Indeed, the California Supreme Court has adopted *Hill*'s some-
 19 evidence test as the judicial standard to be used in evaluating parole decisions, *In re Rosenkrantz*,
 20 29 Cal. 4th 616 (2002), and Ngo has not shown that the state courts unreasonably applied the
 21 standard.

22 Looking through to the last reasoned state court decision, *Ylst v Nunnemaker*, 501 US
 23 797, 804-06 (1991), the superior court properly concluded that some evidence in the record
 24 supported the Board's finding that Ngo was unsuitable for parole because public safety
 25 considerations required longer incarceration based on the commitment offense, and that he
 26 minimized the gravity of the crime and thus lacked insight. (Ex. 2 at 3.)⁴ Ngo has not shown

27 4. It is unclear if the Board relied on Ngo's lack of insight only in its separate decision
 28 denying him parole for two years. (See Pet., Ex. 1 at 67-69.) Either way, the Board's reliance on
 this factor was supported by some evidence. (Pet., Ex. 1 at 67-68.)

1 that the state court unreasonably applied the some-evidence standard of *Superintendent v. Hill*,
 2 472 U.S. 445, 454-57. Rather, Ngo is requesting that this Court re-weigh his suitability, and this
 3 has no basis in federal law. *Hill*, 472 U.S. at 455.

4 **C. Ngo Has Not Shown that the State Court Decisions Were Based
 5 on an Unreasonable Determination of the Facts.**

6 Under § 2254(d)(2), habeas corpus can not be granted unless the state courts' decisions
 7 were based on an unreasonable determination of the facts in light of the evidence presented in the
 8 state court. The state court's factual determinations are presumed to be correct, and the petitioner
 9 has the burden of rebutting that presumption by clear and convincing evidence. 28 U.S.C. §
 10 2254(e)(1).

11 Although Ngo alleges that the Board did not consider all relevant factors, he does not
 12 show that the state court made factual errors. The superior court found that the Board pointed to
 13 a factor beyond the minimum elements of second degree murder when relying on his crime to
 14 deny him parole. (Ex. 2 at 3.) Specifically, the superior court noted how Ngo and other gang
 15 members attacked a fifteen-year-old fellow gang member by beating, kicking, and fatally
 16 shooting the victim. (Ex. 2 at 1.) The superior court noted that Ngo did not shoot the victim, but
 17 that the Board "pointed over and over to the gang-related nature of the offense" and "the death of
 18 the young victim resulted from gang rivalry." (Ex. 2 at 3.) The superior court also noted that the
 19 Board properly concluded that longer incarceration was necessary because by stating that he
 20 thought he was going to a fist fight, Ngo minimized the gravity of the crime and his involvement,
 21 and demonstrated a lack of insight. (Ex. 2 at 1-3.)

22 Ngo has not alleged by clear and convincing evidence that the superior court's factual
 23 determinations are incorrect. Accordingly, the superior court properly concluded that some
 24 evidence supported the Board's findings about Ngo's commitment offense and lack of insight.
 25 (Ex. 2 at 3.) Ngo's disagreement reflects the weight the Board assigned to the evidence, but this
 26 disagreement does not entitle Ngo to federal habeas relief. *Hill*, 472 U.S. at 455.

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CONCLUSION

Ngo has not demonstrated that the state court decisions denying habeas relief were contrary to, or an unreasonable application of, United States Supreme Court authority, or were based on an unreasonable determination of the facts. Thus, this Court should deny the Petition.

Dated: September 3, 2008

Respectfully submitted,

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **Ngo v. Curry**

No.: **C08-0620 JSW**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On September 3, 2008, I served the attached

**RESPONDENT'S ANSWER TO THE PETITION FOR WRIT OF HABEAS CORPUS;
SUPPORTING MEMORANDUM OF POINTS AND AUTHORITIES**

by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

**Sieu Phong Ngo, J-07024
Correctional Training Facility
P.O. Box 689
Soledad, CA 93960-0689
in pro per**

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on September 3, 2008, at San Francisco, California.

J. Palomino

Declarant

20139199.wpd


Signature